S.B.CIVIL MISC. APPEAL NO.890/2003

M/s. Tawa Nine and another.
vs.
The Bank of Rajasthan Ltd. and another.

DATE OF JUDGMENT ::: 24.2.2006

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. SD Vyas, for the appellants.
Mr. OP Pungalia, for the respondent.

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Heard learned counsel for the parties.

The appellants are aggrieved against the order of the trial court dated 15.10.2003 by which their application filed under Order 9 Rule 13 CPC for setting aside ex-parte decree dated 18.11.2002 passed in civil suit no.90/2002, was dismissed.

According to learned counsel for the appellants, the suit was filed on 15.3.2002 and the same was dismissed ex-parte on 18.11.2002.

According to appellants, the counsel appearing for appellants in the trial court (for short “local counsel”) did not inform about the date and decision of the suit and, therefore, the appellants could not appear before the trial court.

Learned counsel for the appellants submitted that the

appellants submitted application for setting aside the ex-parte decree and also gave his statement that he was away from Jodhpur because of his business work and he was at Delhi. It is also submitted that the court below committed error of law in rejecting the appellants' application on the ground that the written statement was not filed by the appellants. It is also submitted that even if the written statement was not filed and it could not now be filed, then too the appellants may suffer to the extent of actual consequences of not filing the written statement but if the ex-parte decree is set aside, the appellants shall have right to contest the suit on the basis of the pleas raised by the plaintiff and on the basis of evidence which may be produced by the plaintiffs and the defendant may demolish the case by cross examining the plaintiff's witnesses.

Learned counsel for the appellant relied upon the judgment of the Hon'ble Supreme Court in the case of Sushila Narahari and others vs. Nanda Kumar and another reported in RLW 1996 (3) (SC) 151 wherein the Hon'ble Apex Court on the finding that the counsel withdrew the vakalatnama without informing the party, delay in filing the application can be condoned and the client cannot be made to suffer because of fault of the advocate.

I considered the submissions of learned counsel for the parties and perused the facts of the case and the reasons given by the court below.

It is true that no party can be made to suffer because

of the fault of advocate but here in this case, the advocate appeared on behalf of the appellants on instructions of the appellants. The advocate also sought time for filing the written statement before the trial court and he also informed the Court that he could not contact the appellants upon which the trial court adjourned the case and fixed the date on 8.8.2002 and on 8.8.2002, the local counsel informed that the appellant went out of station and, therefore, the Court, on request of local counsel, adjourned the case on payment of costs of Rs.50/- Thereafter, when the written statement was not filed till 26.8.2002, the case was proceeded ex-parte. The court below after taking note of this fact considered the evidence of the witness AW1 in detail and found that the statements of the witnesses are not reliable, therefore, on two counts, the court below dismissed the application for setting aside the ex-parte decree – one is that the defendant did not submit the written statement in time obviously by that time, it was the duty of the defendant to contact his advocate. Advocate sought time and disclosed that he made efforts but could not contact the defendant as stated in the order-sheet of 1.8.2002, therefore, if the court below found that it was not the default of the advocate but it was a gross negligence of the defendant, the trial court has not committed any error and in the light of the same reasons, the judgment of Hon'ble Supreme Court delivered in the case of Sushila (supra) has no application in the present case.

So far as condonation of delay by this Court in filing the application under Order 9 Rule 9 CPC is concerned, for the condonation of delay, considerations are entirely different than the merits of the case for setting aside the ex-parte decree.

In view of the above, this appeal having no merits, is hereby dismissed.

(PRAKASH TATIA), J.

S.Phophaliya